DOCKET

PROCEEDINGS AND ORDERS DATE: 032905

CASE NBR 83-1-07032 CFH
SHORT TITLE Bowden, Jerome
VERSUS Francis, Warden

DOCKETED: Jun 28 1984

Date	Proceedings and Orders
Jun 28 1984	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Jul 16 1984	Application for recall and stay filed with LFP, A-31.
Jul 17 1984	Order denying same by Powell, J.
Jul 30 1984	Brief of respondent Francis, Warden in opposition filed.
Aug 2 1984	DISTRIBUTED, September 24, 1984
Mar 11 1985	REDISTRIBUTED, March 15, 1985
Mar 18 1985	REDISTRIBUTED, March 22, 1985
Mar 25 1985	Petition GRANTED, Judgment VACATED and case REMANDED for further consideration in light of Ake v. Oklahoma, 470 U.S. _____ (1985). Dissenting opinion by Justice O'Connor, with whom Justice White and Justice Rehnquist join. (Detached opinion.) Justice Powell OUT.

PETITION FOR WRIT OF CERTIORARI

ORIGINAL

83-7032

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-

RECEIVED
JUN 28 1984
OFFICE OF THE CLERK
SUPREME COURT, U.S.

JEROME BONDEN,

Petitioner,

v.

ROBERT FRANCIS, Warden
Georgia Diagnostic and
Classification Center,

Respondent

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

Petitioner, Jerome Bonden, by his undersigned counsel, moves leave to file the attached Petition for Writ of Certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner's affidavit of indigency is attached to this motion.

Respectfully submitted,

ANDREW F. SIMMS
P.O. Box 599
Atlanta, Georgia 30301
(404) 523-7326

COUNSEL FOR JEROME BONDEN

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-

JEROME BONDS,

Petitioner,

v.

ROBERT FRANCIS, Warden
Georgia Diagnostic and
Classification Center,

Respondent

AFFIDAVIT OF INDIGENCY

I, JEROME BONDS, being first duly sworn, depose and say that I am the Petitioner in the above-entitled cause; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes ___ No X

a. If the answer is "yes", state the amount of your salary or wages per month, and give the name and address of your employer.

b. If the answer is "no", state the date of last employment and the amount of the salary and wages per month which you received.

January 1979 $97.00 per week

2. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession or form of self-employment? Yes ___ No X
b. Rent payments, interest or dividends? Yes ___ No X
c. Pensions, annuities or life insurance payments? Yes ___ No X
d. Gifts or inheritances? Yes ___ No X
e. Any other sources? Yes ___ No X

If the answer to any of the above is "yes", describe each source of money and state the amount received from each during the past twelve months.

3. Do you own cash, or do you have money in a checking or savings account? Yes ___ No X (Include any funds in prison accounts.)

If the answer is "yes", state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes ___ No X

If the answer is "yes", describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support. N/A

I declare under penalty of perjury that the foregoing is true and correct.

Dated: _____

_____
AUGUSTUS SIEMON

Sworn to and subscribed to before me this ___ day of _____, 1984.

_____
NOTARY PUBLIC

My commission expires:

_____

83-7032

CERTIFICATE OF SERVICE

I hereby certify that I have this day served counsel for the opposing party with a copy of the foregoing pleading by placing the same in the United States Mail with adequate first-class postage attached thereto, addressed to Ms. Susan Boleyn, Assistant Attorney General, 132 State Judicial Building, 40 Capitol Square, S.W., Atlanta, Georgia 30334.

This 29th day of June, 1984.

_____
AUGUSTUS F. SIEMON
Counsel for Appellant

CERTIFICATE

I hereby certify that JEROME BOWDEN, the Petitioner herein has the sum of $ ——.26 on account to his credit at the Georgia Diagnostic and Classification Center where he is confined. I further certify that Appellant likewise has the following securities to his credit according to the records of said Georgia Diagnostic and Classification Center: None

Dated: this 26th day of June, 1984.

David Cathey Sale Mgr.
Authorized Officer of the
Georgia Diagnostic and
Classification Center

83-7032

ORIGINAL

RECEIVED
JUN 28 1984
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-

JEROME BOWDEN,

Petitioner,

v.

ROBERT FRANCIS, Warden
Georgia Diagnostic and
Classification Center,

Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

AUGUST F. SIEFON
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COUNSEL FOR PETITIONER

RECEIVED
JUN 29 1984
OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTIONS PRESENTED

I. WHETHER PETITIONER, WHO WAS INDIGENT AND MENTALLY RETARDED AT THE TIME OF HIS CAPITAL TRIAL, WAS DENIED HIS RIGHTS TO DUE PROCESS, EQUAL PROTECTION AND A RELIABLE SENTENCING DETERMINATION AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY THE TRIAL COURT'S REFUSAL TO APPOINT A STATE PAID PSYCHOLOGIST OR PSYCHIATRIST TO EXAMINE PETITIONER PRIOR TO THE TRIAL.

II. WHETHER PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT IS CAPITAL SENTENCING TRIAL AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

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I. WHETHER PETITIONER, WHO WAS INDIGENT AND MENTALLY RETARDED AT THE TIME OF HIS CAPITAL TRIAL, WAS DENIED HIS RIGHTS TO DUE PROCESS, EQUAL PROTECTION AND A RELIABLE SENTENCING DETERMINATION AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY THE TRIAL COURT'S REFUSAL TO APPOINT A STATE PAID PSYCHOLOGIST OR PSYCHIATRIST TO EXAMINE PETITIONER PRIOR TO THE TRIAL. 3

II. WHETHER PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT IS CAPITAL SENTENCING TRIAL AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. 5

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. (1)-

JEROME BOWDEN,

Petitioner,

v.

ROBERT FRANCIS, Warden
Georgia Diagnostic and
Classification Center,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, Jerome Bowden, requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in Bowden v. Francis, ___ F.2d ___ (1984). Jerome Bowden is currently under sentence of death in the State of Georgia.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals rendered on May 14, 1984 is reported at ___ F.2d ___. A copy of the Eleventh Circuit slip opinion is attached as Appendix A. Rehearing en banc was denied by the Court of Appeals on June 22, 1984. (Appendix B).

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The opinion of the Court of Appeals was rendered May 14, 1984 and rehearing and rehearing en banc denied June 22, 1984.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

HOW THE ISSUES WERE RAISED BELOW

Each of the constitutional issues in the Questions Presented were raised by Petition for Writ of Habeas Corpus in the District Court and raised on appeal to the United States Court of Appeals for the Eleventh Circuit.

STATEMENT OF THE CASE

A. Course of Proceedings

On December 9, 1974, Petitioner was convicted of murder, armed robbery, burglary and aggravated assault in the Superior Court of Muscogee County, Georgia; he received sentences of death, life imprisonment, twenty years and ten years respectively. The judgment of the trial court was affirmed by the Supreme Court of Georgia. Bowden v. State, 239 Ga. 821, 234 S.E.2d 905 (1977).

After exhausting state remedies, Petitioner then filed on December 10, 1982, a Petition for Writ of Habeas Corpus in the District Court for the Middle District of Georgia. The Petition was denied on May 6, 1983.

On May 14, 1984, the Eleventh Circuit affirmed the District Court's denial of habeas corpus relief. Petitioner's motion for rehearing and rehearing en banc was denied on June 22, 1984.

B. Statement of Facts

The facts relevant to each of the issues presented are set out in the Reasons for Granting the Writ.

REASONS FOR GRANTING THE WRIT

I. PETITIONER, WHO WAS INDIGENT AND MENTALLY RETARDED AT THE TIME OF HIS CAPITAL TRIAL, WAS DENIED HIS RIGHTS TO DUE PROCESS, EQUAL PROTECTION AND A RELIABLE SENTENCING DETERMINATION AS GUARANTEED BY THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY THE TRIAL COURT'S REFUSAL TO APPOINT A STATE PAID PSYCHOLOGIST OR PSYCHIATRIST TO EXAMINE PETITIONER PRIOR TO THE TRIAL.

In Ake v. Oklahoma, ___ U.S. ___, 34 Cr.L. 4239 (Case No. 82-5424, March 19, 1984), this Court granted Certiorari to decide the same issues Petitioner seeks to present here.

Prior to trial, Petitioner, an indigent person, filed a motion for the appointment of a psychiatrist to perform a psychiatric evaluation. Petitioner was willing to accept either a court compensated private psychiatrist or an evaluation at the state mental hospital. (Doc 7 Pretrial Motions). The State opposed the motion on the basis that the personnel at the Muscogee County Jail had not reported to the prosecutor any strange behavior on Petitioner's part. (7 Pretrial Motions, pp. 3-4). Appellant's central issue at all stages of the proceedings against him in the Superior Court of Muscogee County, Georgia was his mental condition.

At the pretrial hearings, Petitioner made a reasonable showing of the need for a psychiatric evaluation. Petitioner presented evidence from family members that showed a pattern of erratic, irrational behavior occurring over an extended period of time, including the fact that Petitioner had attended a "retarded school", and that his family had previously attempted to obtain psychiatric help for Petitioner but had been unable to afford it. (7 Pretrial Motions, pp. 7-33). In addition, Petitioner's trial

counsel testified, under oath, that although he, counsel, felt that Petitioner was genuinely trying, he was unable to communicate in a coherent manner. (T Pretrial Motions pp. 49-59).[1]

In spite of testimony, the trial court denied the motion for psychiatric evaluation. (T Pretrial Motions p. 56).

Because of this lack of expert evaluation, Petitioner was precluded from litigating any psychiatric issues including the issue of his competence to stand trial and mental illness in mitigation of sentence at the sentencing phase of trial. Indeed, counsel for Petitioner was precluded from even making a proffer of what evidence he would present in support of these issues since the only testimony available was that of Petitioner's relatives, none of whom had had psychiatric training.

Unquestionably, a defendant in a capital murder trial must be allowed to proffer, and a jury permitted to consider, any evidence of mitigation submitted as a basis for a sentence less than death. Lockett v. Ohio, 438 U.S. 586, 604 (1978). In Lockett, this Court concluded that:

> [T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

The Court reiterated these safeguards in Eddings v. Oklahoma, 455 U.S. 104 (1982), by invalidating a death sentence imposed without the consideration "of individualized . . . mitigating factors . . . required by the Eighth and Fourteenth Amendments in capital cases." 455 U.S. 104, 105 (quoting

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1. At his extraordinary motion for new trial, Appellant presented documentation to show that he has an I.Q. of 59, is mentally retarded, has little or no insight and is extremely malleable. (T. Extraordinary Motion for New Trial (unnumbered)).

Lockett, 438 U.S. 586, 604). In Eddings, the sixteen-year-old defendant presented substantial mitigating evidence of turbulent family history, beatings by a harsh father, and serious emotional disturbance. The state trial court found the defendant's youth to be a circumstance in mitigation but refused, as a matter of law, to consider the defendant's troubled upbringing and emotional disturbance in mitigation. This Court held that this refusal violated the rule announced in Lockett because the state court had limited its consideration of mitigating circumstances. The Court stated that "[j]ust as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer, refuse to consider, as a matter of law, any relevant mitigating circumstance." Eddings v. Oklahoma, 455 U.S. 104, 113-15. (emphasis in original).

The denial of expert assistance here effectively cut off petitioner's ability to present the issue of his mental state in any phase of his trial.

II. PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT IS CAPITAL SENTENCING TRIAL AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In Strickland v. Washington, ___ U.S. ___, Slip Op. pp. 14, 15 (May 14, 1984), the Court stated:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient . . . Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Petitioner contends that his trial counsel was ineffective because he failed to adequately investigate, prepare and present evidence in his defense.

The lead counsel at Petitioner's trial was Mr. Samuel Oates, appointed by the trial court. Although Mr. Oates was able to obtain co-counsel for trial and some other informal assistance, he was the attorney responsible for the pre-trial investigation and preparation.

Mr. Oates was admitted to practice law only eighteen months prior to Petitioner's trial. (State Habeas Corpus T. at 161). Mr. Oates had never previously tried a murder case and had tried only approximately six felony cases prior to Petitioner's trial. (State Habeas Corpus T. at pp. 160-161).

Trial counsel's investigation of the state's case against Petitioner consisted almost exclusively of the information the prosecutor chose to supply to trial counsel. No independent investigation was conducted. Trial counsel never made any attempt to contact any of the following critical state's witnesses (State Habeas Corpus T. at p. 16): John Weigel, Jr., the criminalist from the state crime lab who identified blood on the pellet rifle seized from the home of Petitioner's co-indictee; Rusty Blankenship, the microanalyst from the state crime lab who identified hair similar to the victim's hair on the pellet rifle; Joe Webber, the pathologist who conducted the autopsy on the victim; Bonnie Charles Robert, who purchased from Petitioner's co-indictee the television stolen from the victim; Brian Banks, the crime lab director who was in charge of the physical evidence submitted for scientific analysis.

Trial counsel never spoke with any of the substantive state witnesses.

Trial counsel's sole strategy, if there was any strategy during the guilt/innocence phase of trial was to attempt to discredit the testimony of the interrogating officers who obtained the inculpatory statement from Petitioner (State Habeas Corpus T. at p. 164). The focus of trial counsel's "defense" was to show that the Petitioner's co-indictee, Jamie Graves, was the instigator and more culpable person in the commission of the offense and that Petitioner's "confession" was coerced by police who told Petitioner the details of Graves' confession and Petitioner merely repeated those details in his confession. (See T. Trial generally).

Despite the fact that counsel's "defense" at trial was based almost exclusively upon the credibility of the police officers, trial counsel never tried to talk with these police officers concerning the testimony they were to give (State Habeas Corpus at p. 161). Counsel's sole justification for this failing was that his "experience," an experience of only eighteen months of practice, was that police were "generally not very helpful with defense counsel." (Supp. Ex. 1 at p. 161).

After the conclusion of guilt were returned against Petitioner, the trial court immediately proceeded into the sentencing phase of the trial. The state introduced negative evidence of Petitioner's prior convictions. Unprepared for this evidence, trial counsel placed Jerome Bowden on the stand to testify that none of these prior convictions involved the use of violence (T. Trial, p. 620).

Trial counsel's strategy for the sentencing phase, judging from his closing arguments, was to argue that Petitioner was "weak minded" (T. Argument at pp. 12-16). Trial counsel, however, presented no evidence in support of his argument. Although the trial court denied Petitioner's pre-trial motion for a psychiatric evaluation, reasonable investigation by trial counsel

would have discovered substantial evidence in support of this mitigating circumstance.

At the second state evidentiary hearing and at the extraordinary motion for new trial, Petitioner presented significant psychological evidence available simply through an examination of Petitioner's actual and employment records. (Extraordinary Motion for New Trial T. at pp. 11-26).

Jerome Bowden has an I.Q. of only 77 and is functioning within the lower limits of mild retardation. He has little or no insight into his situation, is easily distracted and has a tendency to act on impulse regardless of the consequences. Jerome Bowden was employed on a janitor under the "sheltered employment" program for the mentally retarded at Goodwill Industries. (Extraordinary Motion for New Trial T.).

There was plenty of evidence presented by the State's witnesses at trial to indicate that Petitioner's co-indictee, Jerome Bowden, was the true driving force behind the offense. The weapon used to kill Mrs. Stryker was found at James Graves' residence (T Trial pp. 110-112); the weapon used to kill Mrs. Stryker was found at James Graves' residence (T Trial pp. 116-178); James Graves alone sold the stolen stereo from the victim's home and possessed the proceeds of that sale (T Trial pp. 179-182, 191); James Graves alone sold the television stolen from the victim's home. (T Trial pp. 369-371).

It would seem it may have been difficult for the jury to accept that the 24-year-old Jerome Bowden was manipulated by the 20-year-old James Graves. However, these facts on cross-examination could have been persuasively presented had the jury known that Jerome Bowden had an I.Q. of only 77, was mentally retarded and had the jury "understood" the importance of

malleability interwoven in such a personality... this [malleability] manifested itself in adolescence as either doing what his mother or his friends told him to do. He [Petitioner] had no sense of self that would allow him to make up his own mind." (Extraordinary Motion for New Trial T. at pp. 12-13).

None of this available evidence was presented by trial counsel. The failure to present this evidence was not due to any strategy decision; counsel's strategy was to present Petitioner's "weak-minded" nature to the jury. The failure was due solely to ineffective representation.

The first hurdle Petitioner must clear as required by Strickland v. Washington is to show that counsel's performance was deficient. The Court emphasized that a defendant must "overcome a presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy'." Supra, Slip Op. at p. 19. As stated above, however, it is clear that counsel's strategy was to present Petitioner as mentally deficient. This strategy in mitigation complemented the position the defense took at the guilt portion of the trial. As stated by the Court in Strickland, "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary". Supra, Slip Op. at p.20. Petitioner's counsel made a reasonable decision as to strategy but utterly failed to conduct even a cursory investigation to discover readily available evidence in support of his strategy. Applying a "heavy measure of deference to counsel's judgments" Id., fails to explain why counsel was so inactive in implementing the trial strategies.

The Circuit Court's opinion holds that Petitioner in effect failed to satisfy the second requirement of Strickland, that of prejudice, because the omitted evidence was merely cumulative:

that since Petitioner was able to give testimony that implied that he was retarded he was not harmed by his lawyer's failure to present the testimony of a trained psychologist on the specifics of his mental deficiencies. As Strickland makes clear, however, the prejudice factor is tied closely to the reliability of the result. To hold that a retarded person with an I.Q. of 59 is as reliable a witness as a disinterested, licensed psychologist on the subject of mental deficiency and its effects on behavior is simply wrong.

The Petitioner's mental deficiency was the cornerstone of all the defense strategies in both portions of the trial, particularly the defense that Petitioner was not the "prime mover" in the crimes. Had the jury accepted this deficiency as true, there was a reasonable possibility that they would have concluded that Petitioner was not the motivator behind the offenses and that they would have sentenced him to life. This argument is particularly compelling since a jury sentenced Petitioner's co-defendant, Groves, to life in a separate proceeding.

In a capital trial, "[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." Jurek v. Texas, 428 U.S. 262, 276 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). The Circuit Court's opinion that this information was reliably presented by the testimony of a mentally retarded defendant ignores common sense and should be reviewed by this Court.

CONCLUSION

For the reasons stated above, Petitioner requests that his Petition for Writ of Certiorari be granted.

Respectfully submitted,

AUGUST F. SIEMON
P.O. Box 549
Atlanta, Georgia 30301
(404) 523-7306

COUNSEL FOR JEROME BOSTEL

CERTIFICATE OF SERVICE

I hereby certify that I have this day served counsel for the opposing party with a copy of the foregoing pleading by placing the same in the United States Mail with adequate first-class postage attached thereto, addressed to Ms. Susan Boleyn, Assistant Attorney General, 132 State Judicial Building, 40 Capitol Square, S.W., Atlanta, Georgia 30334.

This 25th day of June, 1984.

August J. Siemon
ROBERT H. ZIMMER
Counsel for Appellant

EDITOR'S NOTE

PAGES 324 - END WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ed his free processing evidence of his mental illness in mitigation of sentence at the sentencing phase of his trial, in violation of the due process clause of the Fourteenth amendment. Third, Barker claims that the trial court prevented his attorneys from arguing Barker's mental condition to the jury as a mitigating circumstance during the sentencing phase of the trial, in violation of the eighth and fourteenth amendments. Fourth, Barker claims that the prosecutor denied him due process of law, in violation of the fourteenth amendment, by failing to give him clear notice of the prior convictions the state planned to use against him as an aggravating circumstance at the sentencing phase of his trial. Fifth, Barker claims that the trial court denied him his sixth and fourteenth amendments right of confrontation by allowing the prosecutor to introduce James Grissom's testimony into evidence without calling Grissom to the witness stand to testify.[1] Sixth, Barker claims that his trial counsel rendered ineffective assistance, in violation of the sixth and fourteenth amendments, in failing to interview prosecution witnesses prior to trial and in failing to uncover readily available evidence of Barker's low intelligence for use in mitigation during the sentencing phase of Barker's trial.

1. Barker's counsel failed to make this claim [illegible] Barker's failure to object at trial to the introduction of Barker's confession on sixth and fourteenth amendment grounds; (2) that Barker failed to give the [illegible] and (3) that Barker could not obtain reversal of his claim on the grounds raised on habeas corpus. See [illegible]. Barker failed to pursue the first step. We cannot determine with certainty whether Barker pursued the second step, the superior court's dispositive opinion does not indicate whether Barker pursued a certificate of probable cause for review, and we have not been [illegible]

Barker contends that the record establishes that he was entitled to the issuance of the writ. If the record does not establish these claims as a matter of law, Barker contends that he is entitled to an evidentiary hearing in the district court to prove them. We conclude that an evidentiary hearing in the district court is not necessary. Barker's first five claims must be determined on the basis of the record of the criminal proceedings, both pretrial and trial, against Barker in the Superior Court of Muscogee County. That record demonstrates that Barker is not entitled to relief on any of these claims. Barker's sixth claim was fully and fairly litigated in the first habeas corpus proceeding that Barker brought in the Superior Court of Butts County. That court's findings of fact in this claim, which are presumed to be correct,[2] demonstrate that Barker's sixth claim could also be denied.

II.

A.

[1] [2] Barker claims that the trial judge committed constitutional error by refusing to grant him a continuance for the purpose of determining whether he was competent to stand trial. On the morning of trial, Barker's counsel informed the court that Barker had been examined by a psychiatrist who had concluded that Barker was mentally incompetent, incapable of understanding the nature of the proceedings against him and planning his defense in the conduct of his defense. *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975); *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). Barker's counsel did not request a continuance, however, but instead requested that Barker be committed to a state mental hospital for a psychiatric examination. The trial judge denied this request, but granted a continuance to allow Barker's counsel time to file a motion for a psychiatric examination, and counsel withdrew Barker's motion for a mental examination.

Barker went to trial on December 7, 1978. On December 9, at the conclusion of the guilt phase of the trial, the jury found Barker guilty as charged. The sentencing phase of the trial followed for the purpose of determining whether Barker should receive the death penalty for the murder of Mrs. Barker. The jury found that the murder had been committed under aggravating circumstances and recommended that Barker be sentenced to death.[3] The court, being bound under Georgia law to follow the jury's recommendation, sentenced Barker accordingly.

B.

On direct appeal, the Georgia Supreme Court affirmed Barker's convictions and his death sentence. *Barker v. State*, 239 Ga. 870, 239 S.E.2d 345 (1977), *cert. denied*, 435 U.S. 947, 98 S.Ct. 1533, 55 L.Ed.2d 550 (1978). Barker then petitioned the Superior Court of Butts County, Georgia for a writ of habeas corpus. The court, following an evidentiary hearing, denied Barker's petition on January 16, 1979. The Supreme Court of Georgia affirmed. *Barker v. Zant*, 241 Ga. 268, 268 S.E.2d 451 (1978), *cert. denied*, 444 U.S. 1102, 62 L.Ed.2d 788, 100 S.Ct. 1065 (1980).

[illegible] Barker was charged with having ordered Mrs. Barker killed in exchange for the commission of another capital felony, [illegible] and while he was engaged in the commission of burglary. *Id.* at 872.

3. Barker's counsel failed to make this claim [illegible] Barker's failure to object at trial to the introduction of Barker's confession on sixth and fourteenth amendment grounds; (2) that Barker failed to give the [illegible] and (3) that Barker could not obtain reversal of his claim on the grounds raised on habeas corpus. See [illegible]. Barker failed to pursue the first step. We cannot determine with certainty whether Barker pursued the second step, the superior court's dispositive opinion does not indicate whether Barker pursued a certificate of probable cause for review, and we have not been [illegible]

Barker's counsel informed the court that Barker's competency to stand trial for the purpose of determining whether he was competent to stand trial. On all matters a violation of due process to try a mentally incompetent defendant is carefully safeguarded, incapable of understanding the nature of the proceedings against him and planning his defense in the conduct of his defense. *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975); *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). Barker's counsel did not request a continuance, however, but instead requested that Barker be committed to a state mental hospital for a psychiatric examination. The trial judge denied this request, but granted a continuance to allow Barker's counsel time to file a motion for a psychiatric examination, and counsel withdrew Barker's motion for a mental examination.

While a court has a bona fide doubt as to the defendant's competence [to stand trial], it must not unduly conduct a hearing on the competence to stand trial. *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966); *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975); *Bruce v. Estelle*, 536 F.2d 1051, 1059 (5th Cir. 1976). The procedural guarantee known as a "*Pate* hearing," protects the defendant's substantive constitutional right to a fair trial.

Drope v. Zant, 416 F.2d at 1560.

Barker claims that prior to trial he raised a bona fide doubt as to his competence to stand trial and that the trial court was accordingly obligated to conduct a *Pate* hearing. The court failed to do so. Consequently, Barker contends, the district court, as instructed by *Pate*, should have held "a nunc pro tunc competency hearing [if] a meaningful inquiry into [his] competency [at the time of his trial] could still be made." *Id.* Barker asserts that such a meaningful inquiry is no longer possible. Therefore, he must be retried, assuming he is now competent. If he is not, he must be released. *Id.* We disagree.

[3] The prosecution of the second of the proceedings in the state trial court, originally those which dealt with Barker's suggestion that he was incompetent to stand trial, indicates to us that a bona fide doubt as to Barker's competence was not presented. Accordingly, the trial judge was not obligated to have Barker examined by a psychiatrist to determine his competence and, after assessing the psychiatrist's report, to hold a hearing to adjudicate his competence to stand trial.

The only evidence Barker presented to raise a bona fide doubt as to his competence was: (a) we have referred supra, the testimony of his trial trial lawyer, his sister and his niece. The lawyer, Samuel Thirty, testified that Barker had been unable to give him a clear sequence of his activities on the day the crimes at the barber shop were committed. Thirty added however, that Barker was concerned about his case and was attempting to assist him in the preparation of his defense. For example, Barker told that he had an alibi, he was with a friend watching television when the crimes were taking place, and that the codefendant he had given the police had been coerced. Barker's sister and niece testified that Barker had lived with them until the winter, between and [illegible] for several months following his release from prison in August 1976. During that time, he never observed Barker sit on the bed and rock, often for several hours, he did this no more than he was not working. His sister said that the children sometimes complained that Barker would "stare" at them. She also testified that, upon returning after Barker had had criminal charges with the law, her mother thought he needed psychiatric help. The trial judge concluded that the evidence suggesting Barker's incompetency was, taken as a whole, insufficient to "warrant the expense of a psychiatric evaluation," and he denied Barker's

[illegible] Barker's counsel filed a special plea of insanity and moved the Muscogee County Superior Court for the appointment of a psychiatrist to evaluate Barker. He sought to have a psychiatrist render opinions on whether Barker was competent to stand trial and whether he was sane at the time he committed the crimes. At an evidentiary hearing on the motion, counsel presented evidence that, he contended, supported that Barker was incompetent to stand trial. Barker's sister and niece, with whom Barker had lived for several months, testified to certain aspects of Barker's behavior they considered to date. He would sometimes sit on the bed and rock for hours at a time; on other occasions he would "stare out" the children in the family. The sister also stated that Barker's mother once attempted to have [illegible] examined by a psychiatrist, after Barker had gotten into trouble with the law. Barker's lead trial counsel testified that he had been having difficulty eliciting a coherent story from Barker concerning his activities on the day of the crime, counsel

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2. We recommend that a defendant be allowed a [illegible] Muscogee County, in [illegible] the offenses in this case were committed, to [illegible] that the jury find that the murder was committed under one or more aggravating circumstances [illegible]

ed his free processing evidence of his mental illness in mitigation of sentence at the sentencing phase of his trial, in violation of the due process clause of the Fourteenth amendment. Third, Barker claims that the trial court prevented his attorney from arguing Barker's mental condition to the jury as a mitigating circumstance during the sentencing phase of the trial, in violation of the eighth and fourteenth amendments. Fourth, Barker claims that the prosecutor denied him due process of law, in violation of the fourteenth amendment, by failing to give him clear notice of the prior convictions the state planned to use against him as an aggravating circumstance at the sentencing phase of his trial. Fifth, Barker claims that the trial court denied him his sixth and fourteenth amendments right of confrontation by allowing the prosecutor to introduce James Grizzard's confession into evidence without calling Grizzard to the witness stand to testify.[1] Sixth, Barker claims that his trial counsel rendered ineffective assistance, in violation of the sixth and fourteenth amendments, in failing to interview prosecution witnesses prior to trial and in failing to uncover readily available evidence of Barker's low intelligence for use in mitigation during the sentencing phase of Barker's trial.

1. We construe Barker's claim that the state failed to disclose Grizzard's confession as a claim that the state violated Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Barker's claim that the state failed to disclose Grizzard's confession is not a claim that the state violated Barker's fifth amendment privilege against self-incrimination. Barker's claim that the state failed to disclose Grizzard's confession is not a claim that the state violated Barker's sixth amendment right of confrontation. Barker's claim that the state failed to disclose Grizzard's confession is not a claim that the state violated Barker's fourteenth amendment right to due process of law. Barker's claim that the state failed to disclose Grizzard's confession is

circumstances of this case provided an appropriate setting for the appointment of psychological assistance," *id.*, and that the state trial court had not abused its discretion in denying Westbrook's request for such assistance.

[6] In this case, the defendant made no such request of the trial judge. Bowden's motion for the appointment of a psychiatrist was limited to the issues of his competence to stand trial and his sanity at the time of the offense. It said nothing about the appointment of a psychiatrist to testify on mitigation during the sentencing phase of a trial. In fact, the claim Bowden now presents was not submitted to the Georgia courts until his appeal to the Georgia Supreme Court from the Butts County Superior Court's denial of his first petition for a writ of habeas corpus.[5] The Supreme Court rejected his claim out of hand, reasoning that it was "without legal basis." *Bowden v. Zant*, 240 S.E.2d at 859.

To hold that the state trial judge denied Bowden due process of law by not providing him with a psychiatrist to testify on mitigation, when Bowden made no request therefore, would require us to find that a trial judge has a duty under the Constitution to make such provision *sua sponte*.

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C.

[7] Bowden argues that the trial judge violated his rights under the eighth and fourteenth amendments by preventing his lawyer from arguing Bowden's mental condition as a mitigating circumstance in his submission to the jury at the close of the sentencing phase of his trial. Bowden did not assign this claim as an error in his direct appeal to the Supreme Court of Georgia following his conviction and sentence.[7] This procedural default was cured, however, when that court rejected Bowden's claim on the merits in considering his appeal from the Butts County Superior Court's denial of his first petition for a writ of habeas corpus. *Bowden v. Zant*, 240 S.E.2d at 857. Consequently, we address Bowden's claim without requiring him to satisfy the threshold "cause-and-prejudice" test of *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

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[11] *Illinois v. Zant* instructs that in determining whether a trial court has denied a defendant due process by refusing to obtain a psychiatric evaluation, we must "focus on what the trial court did in light of what it then knew," *id.*, at 108 (emphasis). For example, the defendant's behavior, by "reason of trial and pre-trial hearing, or testifying on his competence to stand trial. In this case, the evidence of Bowden's past behavior and his behavior and demeanor before the trial judge plainly failed to create a bona fide doubt as to his competency to stand trial. There was there any evidence of a prior medical opinion that might have raised such a doubt. The trial judge therefore committed no constitutional error in denying Bowden's motion for a psychiatric evaluation.

[12] *Ake* and its progeny hold or at least strongly intimate, however, that a trial court's proper pretrial disposition of a motion for a psychiatric examination that does not rule the matter. If subsequently during trial proceedings a bona fide doubt should arise concerning the defendant's competency, the court would be obliged to reexamine the issue and to act [illegible] in doing so, may be required to obtain an expert psychiatric opinion.

[13] In this case, though, nothing that transpired after the denial of Bowden's motion for an examination raised such a doubt. On the contrary, any inquiry or comment that may have existed concerning the defendant's competence disappeared. First, Bowden's counsel withdrew his special plea of insanity, a fact otherwise that without expert psychiatric testimony to avoid and satisfy a jury, as a trial on the special plea, that his client was competent. That is, by his testimony, which the judge had already considered and regarded, could not carry the day. Second, the events that transpired throughout the remainder of the trial supported the conclusion that Bowden was indeed competent. He took the stand in his own defense and testified coherently, responding to the questions put to him on both direct and cross-examination. He told about circumstances leading to the police after learning that the police had been looking for him and about confessing to the crimes. He said that the police warned his confession, leaving him to adopt blatant untruthfulness, and he insisted that he was innocent.

A reading of Bowden's testimony indicates that Bowden was not only intelligent. It also indicates that he had consulted and interviewed fully with his attorneys in the preparation of his defense and was well aware of the nature and consequences of the proceedings taking place. It is significant to note that Bowden was able to withstand the prosecutor's vigorous and lengthy cross-examination precisely to the end. Confidently professing his innocence and repudiating his confessions as coerced, he did not waver until the prosecutor's final thrust, when asked if he had checked marijuana after he and Graves had committed the crimes in question, he replied that he "got high" that morning. Even then, he attempted to rehabilitate himself, as evidenced by his immediate denial that he had smoked the pot that

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Bowden claims that the trial judge refused to appoint a psychiatrist to examine him for the purpose of presenting evidence of his mental illness to the jury at the sentencing phase of the trial and thereby denied Bowden due process of law. Bowden cites *Westbrook v. Zant*, 704 F.2d 1487 (11th Cir.1983), *as authority* for his position. We conclude that *Westbrook* is inapposite.

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Q. Detective Hillhouse, had you told the statement up to the DA got there?

Q. You heard Detective Hillhouse testify that he had never seen Sockwell sign a statement, didn't you?

A. Yes.

Q. Your testimony is that seven men were in the office while your interrogation was being conducted?

A. Yes.

Q. You were even giving your statement?

A. Yes, sir, I was.

Q. Okay. Tell me what you told the detectives then.

A. Then I told the detectives that I had been upset before Mrs. Sockwell and I—

Q. Actually, that statement that Detective Hillhouse would state hasn't been truthful, either?

A. Mr. Sockwell, I know what I'm telling you is the truth. I'm telling you the truth as I told Detective Myles anything about any kind of statements. The only time I have to take a cigarette that...

Q. You are willing at this time to tell the entire and correct the statement of Detective Myles' statement?

A. What was that?

Q. I am sure. In other words, you are willing at this time to testify to that same agent in that office and the details of that arrest that you told them at your statement given before Detective Myles?

A. Yes, sir.

Q. But you have not told just been afforded to read Detective Myles' statement at the time?

A. Yes, I have.

Q. Is it true that you had not been afforded to read Detective Myles' statement at the time?

A. Yes, I have.

Q. Detective Myles testified that he had told you that you could be in your custody, is that correct?

A. Yes, I have.

Q. And you agreed to do so and it came from the detectives at Detective?

A. No. I was always free to go from the office. I couldn't stand to leave it.

Q. Do you have any idea how much of Detective Myles' statement that have read to you?

A. No, I don't.

Q. Do you recall Detective Myles' statement that Detective Hillhouse [illegible] and Detective Hillhouse [illegible] and the conversation [illegible] as follows:

[illegible] Did you have a chance that the Court should see on this statement some phrases from the statement of Detective Myles to that extent?

Q. That is correct.

C. All right. Now, I think you should be more cautious than you were yesterday at the evening of [illegible] when you were served.

• I would say caution with Detective Myles, I'm sure, I'm sorry, I'm sorry.

• And you were [illegible] and you're still there?

A. Yes, I have.

Q. Detective, you were also present, Mr. Sockwell, [illegible] Detective Hillhouse, is that correct?

A. Yes, I have.

Q. Detective Myles testified that he had [illegible] Mr. Sockwell.

[illegible] Did you ask you this Witness did the end of [illegible] according to the facts your statement [illegible] Mr. Sockwell [illegible] Detective Myles?

A. Yes, I have.

Q.

ant, ought not have succeeded in persuading the Georgia trial court to exclude the truthfulness of Graves' statement was not important. What was important was how Graves' statement compared with Bowden's.

There is no indication in the Georgia Supreme Court's opinion that suggests that Bowden contended, on appeal, that the trial judge, in allowing the prosecutor to proceed, denied him the right of confrontation. However, we do not have the benefit of Bowden's brief to that court on direct appeal,[27] so we cannot be certain that Bowden's arguing his motion in limine to exclude Graves' statement did not also present a claim under the confrontation clause. We will, therefore, give him the benefit of the doubt and address the claim he now makes, considering it to have been presented to and rejected by the courts below the Georgia Supreme Court.[28]

Bowden contends that he was denied the right to confront an accomplice. Graves, just as the petitioners were in *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965), and *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). In *Douglas*, the prosecutor called the petitioner's accomplice to the witness stand after the accomplice invoked his fifth amendment and refused to testify. He read to him from the signed confession which implicated the petitioner, interspersing his reading with the question "did you make that statement?" The accomplice declined to answer. The petitioner objected, claiming a denial of confrontation. The Supreme Court, observing that although the prosecutor's reading of the statement was not testimony the jury may have considered it as such, concluded that the petitioner had been denied the right of confrontation. In *Bruton*, at a joint trial of the petitioner and his accomplice, the prosecution introduced the accomplice's confession into evidence through the testimony of a postal inspector. The confession explicitly incriminated the petitioner. He objected, claiming a denial of confrontation. The district court overruled the jury that the confession was admissible only against the accomplice. The court of appeals affirmed. *Evans v. United States*, 375 F.2d 475 (5th Cir.1967). On certiorari, the Supreme Court reversed. It found a denial of the right of confrontation notwithstanding the trial court's customary jury instruction.

We are not faced with the situation portrayed in *Douglas* and *Bruton*. In *Bruton*, the accomplice's confession was introduced against the accomplice to prove the truth of its contents, as against the petitioner, the confession was rank hearsay. Moreover, as the Court emphasized, the "bizarre" statement inculpating petitioner was clearly inadmissible against him for any purpose under traditional rules of evi-

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27. *See supra* note 9.

28. We note, in passing, that Bowden, in his Georgia petition to the Supreme Court of the State, claimed that the prosecutor's use of Graves' statement during his opening statement denied him "a fair trial" in violation of the Georgia Constitution, art. I, section I, paragraph XI (Code Ann. § 2-111 (1970)). The Supreme Court of Georgia specifically addressed the confrontation issue raised, and rejected

dence. — 391 U.S. at 129 n. 3, 88 S.Ct. at 1627 n. 3.

[11, 12] To the contrary, Graves' statement was plainly relevant, and admissible as corroborative, with respect to the critical evidentiary issue in the prosecution's case, to prove that the petitioner, himself, injected into the trial.[29] Graves' statement could have been placed in evidence as the State's rebuttal through the testimony of Detective Hardaway, who took the statement,[30] not to prove the truth of its contents but to prove who was telling the truth about the source of the words in Bowden's signed confession, Bowden or the deputies. The truthfulness of Graves' statement would not have been an issue, thus, the principal reasons of the confrontation clause, the unreliability of the out-of-court utterance ought to be introduced, would not have been implicated.

[13] But the prosecutor did not choose this course. Instead he chose to introduce portions of Graves' statement into evidence in the form of a preamble to questions he put to Bowden on cross-examination. In doing so, he denied Bowden the right to confront Hardaway. The denial did not occur when Bowden invoked his fifth amendment privilege. Bowden did not decline to answer the prosecutor's questions. Bowden does not dispute that Graves gave Hardaway the statement in question or that both were stated accurately or not at material. He suggests nothing that he could have gained by cross-examining Hardaway on the subject.[31]

[14] Even if we were to hold that the trial judge erred in a confrontation clause sense by allowing the prosecutor to cross-examine Bowden from Graves' statement, we would still reject Bowden's claim, for the error was harmless beyond a reasonable doubt. *See Schneble v. Florida*, 405 U.S. 427, 430-32, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972) (improper admission of codefendant's statement, harmless beyond a reasonable doubt). First, the evidence of Bowden's guilt was strong, if not overwhelming. Second, Bowden himself had already made the jury fully aware of

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29. In this context, the contents of Graves' statement would not be offered for its truth. Thus, it would not be hearsay. Specifically, the jury, overall, in the absence of a timely objection, could use it for the truth of its contents, thereby impeaching Bowden. It is a matter of common law, since extended in Fed.R.Evid. 801(d)(1)(A), that a prior statement of evidence is prejudicial does not preclude its admission into evidence. The decision to admit it is within the discretion of the trial court and is subject to a balancing by the trial court of the probative value against the prejudicial effect. *See, e.g., United States v. Kimball*, 294 F.2d 415 (4th Cir.), cert. denied, 368 U.S. 918, 82 S.Ct. 239, 7 L.Ed.2d 135 (1961) (a trial court would have discretion to admit such evidence where its probativeness was outweighed by unlikely prejudicial effect on the jury). 31 F.R.Evidence, § 801(d)(1).

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Bowden's motion to exclude Graves' statement. He argued that the statement was not admissible as corroborative evidence because Graves' statement was not consistent with Bowden's testimony. Bowden's counsel argued that Graves' statement was not to corroborate Bowden's testimony, but to impeach it. The prosecutor responded that Graves' statement was not to corroborate Bowden's testimony, but to impeach it. The prosecutor responded that Graves' statement was not to corroborate Bowden's testimony, but to impeach it.

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a clinical psychologist had conducted after sentencing. Bowden on November 13, 1981, that he was "not psychotic but definitely [had] mental problems" and was "functioning within the lower limits of mild retardation." Bowden also contends that reasonably effective counsel would have introduced into evidence certain Goodwill Industries records which showed that he had been employed in Goodwill's sheltered employment program as a position from which he was dismissed for stealing and drug abuse. Bowden claims that this evidence, considered with the evidence Hodges did adduce, would have been a persuasive mitigating factor at the sentencing phase of the proceedings and that counsel's failure to present it constituted ineffective assistance. We are not persuaded.

Counsel's arguments to the jury regarding Bowden's history of mental deficiency and the difficulties he had experienced both in and out of the schools during his formative years. It is true that counsel did not introduce said into to the jury the record evidence that supported his argument.

[28] Bowden presents this additional claim to the Georgia Supreme Court in his motion for a new trial. See supra note 1. The court denied Bowden's motion, concluding that the proffered evidence was cumulative of that introduced by Bowden at trial. The court also noted that Bowden's counsel had in fact argued that Bowden had been placed in special education classes in school and that these classes were for people that were slow in learning and had to

[illegible] that such evidence in the Georgia courts have ended," would merely have been cumulative. The prosecution never took issue before the jury with the defense line of argument. Moreover, the jury had ample opportunity to observe Bowden and to decide from the same conclusion about his mental state as it would have drawn had it been given the additional evidence now before us. In sum, there is no reason to believe that the jury on the basis of this additional evidence of Bowden's low intelligence would have recommended a different sentence. We conclude, as the Georgia courts have, that "Bowden's trial counsel easily met the test of reasonably effective counsel." 249 S.E.2d at 88.

III

Since we find no constitutional basis for the assertion of the writ of habeas corpus in this case, the judgment of the district court is

AFFIRMED.

[illegible] and we find no such error." We also find that counsel's decision not to request an instruction on lesser included offenses was reasonable and that the jury had ample opportunity to observe Bowden, his mental condition, and his intelligence as demonstrated by his ability to respond to questions and to organize himself. On Bowden's appeal, the Supreme Court of Georgia affirmed. Bowden v. State, 256 Ga. 687, 354 S.E.2d 131, 137 (1987).

trial statement and of the fact that that statement incriminated him, as well as others, in the botched crimes. Finally, the prosecutor made no mention of the absence of his questions in his closing argument to the jury.

V

Bowden's final claim is that his lead trial lawyer, Samuel Hunt, rendered him ineffective assistance of counsel, in violation of the sixth and fourteenth amendments, in failing to conduct pretrial interviews of prosecution witnesses and in failing to discover and present evidence of Bowden's low intelligence in mitigation at the sentencing phase of the trial. Bowden raised this claim initially in his first habeas corpus petition to the Superior Court of Butts County. That court held an evidentiary hearing on the claim and denied it. [illegible] that the record of that hearing disclosed that Samuel Hunt was ineffective as a matter of law. Bowden claims, alternatively, that if Hunt's ineffectiveness is not plain from the record, we should remand the case to the district court for an evidentiary hearing on that his claim can be resolved.

[17] The Butts County Superior Court conducted "a full and fair hearing" on Bowden's ineffective assistance claim. 28 U.S.C. § 2254(d) (1982), and the material facts were adequately developed. The court found those facts in its [illegible] order. Bowden v. Zant, 250 S.E.2d at 539-71 (appendix to the Georgia Supreme Court opinion), accordingly, they "shall be presumed to be correct." 28 U.S.C. § 2254(d); Sumner v. Zant, 696 F.2d 940 (11th Cir.), cert. denied, — U.S. —, 103 S.Ct. 1718, 77 L.Ed.2d 1291 (1983) (footnote omitted).

Samuel Hunt, as we have indicated, was Bowden's lead trial counsel. Four other lawyers assisted Hunt in preparing and conducting Bowden's defense. [illegible] Hunt, a law partner who specialized in criminal law, William B. Cox, also a criminal trial lawyer, who became the Public Defender sometime after Bowden was indicted, Frank Watts, a criminal law practitioner of considerable experience, and Millard Farmer, a specialist in death penalty cases. Hulett, Collins and Cox were present in court during the trial. Hulett, as lead counsel, cross-examined some of the State's witnesses and put on Bowden's defense. Collins and Cox also cross-examined some of the State's witnesses. Collins delivered Bowden's closing argument to the jury at the conclusion of the guilt phase of the trial. All of these attorneys participated in the preparation of the case for trial. Both Hulett and Collins interviewed Bowden and handled the pretrial motions. Watts and Farmer acted as consultants, giving Hunt technical advice on various procedural problems and trial strategy.

In preparing Bowden's defense for both the guilt and sentencing phases of the trial, Hulett conferred with Bowden on eight or ten occasions and pursued all the leads Bowden gave him. Some, according to Bowden, were dead ends. Hulett never viewed them but declined to go there on the stand because they could not account for Bowden's whereabouts when the crimes were being committed. Cox nevertheless was informed that Bowden was mentally retarded and thought might be helpful, particularly in the sentencing trial. Hulett interviewed them, also, but in a pre-judgment call chose not to call them to testify. He felt that they would hurt Bowden's case more than they would help it.

[illegible] Hunt stated that Bowden was not psychotic but definitely had mental problems. Hunt also testified that he was "not prejudiced by" Bowden's mental problems. Hunt also testified that he was functioning within the lower limits of mild retardation." Bowden also contends that reasonably effective counsel would have introduced into evidence certain Goodwill Industries records which showed that he had been employed in Goodwill's sheltered employment program as a position from which he was dismissed for stealing and drug abuse. Bowden claims that this evidence, considered with the evidence Hodges did adduce, would have been a persuasive mitigating factor at the sentencing phase of the proceedings and that counsel's failure to present it constituted ineffective assistance. We are not persuaded.

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[18] The state habeas court found that Hulett provided Bowden a reasonably effective defense in the guilt phase of the proceeding. The court observed that "there was no sound conclusion that another lawyer might have produced a different result on the question of guilt or innocence. In fact, [Bowden's] own expert admits in the fact that he did not think there was any substantial question of ineffectiveness on the part of trial counsel in the guilt/innocence phase of the trial." Bowden v. Zant, 250 S.E.2d at 421 (appendix to the Georgia Supreme Court opinion). The record fully supports this conclusion.

Hulett examined the prosecution's files and formulated a strategy which had for its fact that it failed could hardly be faulted. Hulett made every legal defense possible to exclude or discredit Bowden's highly damaging statements to the police. He succeeded in excluding one of them, apparently the most incriminating one, on constitutional grounds. Then, before the jury, he localized a vigorous and penetrating cross-examination of the police interrogators, followed by a searching examination of Bowden, to establish a basis for a closing argument that the details of Bowden's confession had been furnished by the police.

[19] Bowden's principal claim of ineffectiveness is that Hulett failed to interview several state witnesses.[20] We cannot determine on a case-by-case basis whether a particular witness should have been interviewed or a particular inquiry made without first examining the likelihood that counsel's effort would have resulted in significant information useful to Bowden's defense. Bowden makes no proffer of what counsel would have discovered had he interviewed these witnesses, and nothing in the record indicates what he would have discovered. In fact, Bowden does not even suggest how counsel's failure to conduct these interviews prejudiced his case.

[20] Turning to the sentencing phase of the case, Bowden contends that he is mentally deficient and that reasonably diligent defense counsel would have unearthed and presented some evidence of this in mitigation. Whether Hulett did present evidence, though Bowden's testimony, that Bowden had done poorly in school, finishing only the eighth or ninth grade, that much of his education had taken place in special education classes for slow learners, and that he was not able to read very well. Counsel also presented evidence that Bowden had left school because of a disagreement with his principal and that his mother had attempted to take psychiatric treatment [illegible] with the law.

Bowden [illegible] could have presented a wealth of this sort to the jury. For example, Bowden should have established from public school records that Bowden had an IQ of fifty-nine, that he was easily distracted, that he had a tendency to act on impulse, and that

[illegible] was similar to the opinion [illegible] Dr. Fuller, the psychologist who conducted the antigen competency exam, Sandra Charles Bobert, who purchased from appellant's co-defendant the silencer and/or from the victim, Brian Starr, the crime lab director who was in charge of the physical evidence submitted for scientific analysis.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 83-8424

FILED

JUN 22 1984

Spencer D. Mercer
Clerk

JEROME BONDEN,

Petitioner-Appellant,

versus

ROBERT FRANCIS, Warden,
Georgia Diagnostic and
Classification Center,

Respondent-Appellee.

Appeal from the United States District Court for the
Middle District of Georgia

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion May 14, 11 Cir., 1984, ____F.2d____).

(June 22, 1984)

Before TJOFLAT and FAY, Circuit Judges, and WISDOM*, Senior Circuit Judge.

PER CURIAM:

( ) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

*Honorable John Minor Wisdom, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

ORDC-6
(Rev. 6/82)

Appendix B

3:15 Conf, Page 18 83-7052

D.J. 3/1/85

D/3268

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

JEROME BONDEN Petitioner v. ROBERT FRANCIS, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER, Respondent	CIVIL ACTION NO. 82-253-COL.

Filed at 11:15 A.M.
MAY 6 1983
Clerk, U.S. District Court

JUDGMENT

Pursuant to the Opinion and Order dated and filed on May 6, 1983, and for the reasons stated therein, the Habeas Corpus Petition is hereby dismissed.

Judgment is therefore entered in favor of the Defendant.

This 6th day of May, 1983.

RICHARD W. RANKIN, CLERK

By _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

JIMMIE DAVIS,	CIVIL ACTION NO. 82-201-COL
Petitioner	
v.	
ROBERT FRANCIS, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,	
Respondent	

Filed in Office
Clerk, U.S. District Court

ORDER AND OPINION

The habeas corpus petitioner above identified received a seventy-year sentence for the offense of burglary, a ten-year sentence for aggravated assault, a life sentence for armed robbery, and the death penalty for murder, after a trial in the Superior Court of Muscogee County, Georgia, in December, 1976. Petitioner's convictions and sentences were affirmed by the Supreme Court of Georgia in Davis v. State, 239 Ga. 831 (1977). He filed a petition for a writ of certiorari to the Supreme Court of the United States and this petition was denied on April, 1978. Thereafter he filed a petition for the writ of habeas corpus in the Superior Court of Butts County, Georgia in June, 1978. Hearings were held in that court on three different dates in July and October, 1978, and in January, 1979 that court denied the relief sought by Petitioner. He then appealed that decision to the Supreme Court of Georgia and in Hawkins v. Zant, 244 Ga. 260 (1979), the decision of the state habeas corpus court was affirmed. Petitioner's motion for rehearing was denied in September, 1979. He then filed another petition for a writ of certiorari to the Supreme Court of the United States which was denied in February, 1980, and a petition for rehearing filed in that court was denied in April, 1980. Petitioner then filed an extraordinary motion for new trial in the Superior Court of Muscogee County in April, 1980, the ground for the extraordinary motion being that the Petitioner had "newly discovered evidence". The extraordinary motion for new trial was denied and Petitioner again appealed to the Supreme Court of Georgia. In Zant v. Davis, 245 Ga. 181 (1980), the Supreme Court of Georgia affirmed the decision of the Superior Court in denying Petitioner's extraordinary motion for a new trial. The Petitioner then filed this application for federal habeas corpus relief along with a motion for a stay of execution which was granted by this Court.

The Petitioner first contends that his constitutional rights were violated because the trial court allegedly refused to consider his incompetence to stand trial. This allegation was raised and considered by the state habeas corpus court, by the Supreme Court of Georgia and by the Supreme Court of the United States. Each of those courts denominated that there was no merit to this constitutional claim. The state habeas corpus court

extensively examined the factual basis of this contention and concluded that based on a consideration of the trial transcript and the testimony at the habeas corpus hearing, the trial judge did not abuse his discretion in denying a motion for a psychiatric examination. The Supreme Court of Georgia reached the same conclusion.

In connection with the filing of his extraordinary motion for a new trial the Petitioner contended that additional evidence had been developed with regard to his mental capacity which should have been considered but the order of the trial court denying the Petitioner's extraordinary motion for new trial shows that this additional evidence was produced at a hearing on the motion and was considered by the trial court in denying the motion. It is clear that the Petitioner was not denied any of his due process rights on the issue of incompetency. He simply was unable to produce evidence which would support his contention that he was incompetent and the Supreme Court of Georgia was justified in concluding that the evidence offered by the Petitioner at the time of the hearing on Petitioner's extraordinary motion for a new trial would have added little for the trial court's consideration of Petitioner's competency in the hearing held on the original motion for a psychiatric expert at the time of trial because the evidence was mainly cumulative of that already before the court. Succinctly stated, there seems to be no basis for the Petitioner's assertion that there was "substantial evidence of Petitioner's incompetence" and that the trial court's refusal to consider this evidence denied him his constitutional rights.

The next contention made by the Petitioner is that the trial court's denial of a motion for funds to obtain an expert psychiatric evaluation unconstitutionally denied him the means and opportunity to present exculpatory evidence. We have already noted that the evidence presented to the trial court in support of a motion for funds for a psychiatric expert was insufficient to raise a bona fide doubt as to the Petitioner's competency so as to mandate a psychiatric examination, but upon the trial of the Petitioner the trial judge did not prevent Petitioner from presenting any such evidence to the jury for whatever value it might have been to him. In other words, if this evidence was considered to be exculpatory the Petitioner had the means and opportunity to present such exculpatory evidence at the time of his trial and none of Petitioner's constitutional rights were violated in this regard.

The Petitioner next contends that the trial court impermissibly limited his counsel's closing argument during the sentencing phase of Petitioner's trial. A review of the transcript of the closing arguments shows that Petitioner's trial attorney did argue concerning mitigating circumstances, including matter bearing on his alleged mental condition. It was only when Petitioner's attorney went beyond matter that was in evidence that the trial judge sustained an objection. The Supreme Court of Georgia reviewed this contention made by the Petitioner in connection with his appeal from denial of state habeas corpus

relief and that court stated the following with reference to that contention:

> "Bowden erroneously asserts that the defense attorney was denied a full argument on the subject of mitigation. He was attempting to argue that Bowden was insane and that the state had denied him the right to prove it. That was untrue, and the trial court committed no error in sustaining an objection to that line of argument."
>
> Bowden v. Zant, 244 Ga. 260, at 262 (1979).

This observation by the Georgia Supreme Court correctly states the situation and the action of the trial court was not violative of Petitioner's constitutional rights.

We next consider the Petitioner's contention that the failure of the state habeas corpus court to provide him with funds to employ expert witnesses prevented him from adequately litigating his state habeas corpus petition. In denying this motion the habeas corpus court noted that there was no support either in the case law or statutes of Georgia which would require that a court provide funds for expert witnesses in a habeas corpus proceeding even where the death penalty was being challenged, although the court noted that there might be a particular case in which a showing could be made that certain evidence was required for an indigent person who was being held under a death sentence. In this case the habeas corpus court determined that in light of the evidence and argument presented in the hearings before the court that the evidence sought by the Petitioner in his motion was not

necessary in order for there to be a full and fair adjudication of the issues raised by the Petitioner. In this connection it should be noted that the fact is that the Petitioner was able to obtain the testimony of a number of witnesses at his habeas corpus hearing, apparently with the assistance of organizations who are dedicated to opposition to the death penalty. The Supreme Court of Georgia properly noted that:

> "Contrary to Bowden's assertions in his brief, his legal claims do not have a 'complex nature', nor are there a 'large number of unresolved factual questions' requiring state paid experts."
>
> Bowden v. Zant, supra, at 264.

A review of the three transcripts of habeas corpus hearings held in the Superior Court of Butts County shows that Petitioner was provided a full and fair hearing on the merits of the allegations raised in his habeas corpus petition.

In the next section of Petitioner's application for federal habeas corpus relief he contends that his due process rights under the Fourteenth Amendment were violated by the failure of the Supreme Court of Georgia to determine that there should be formal notice prior to trial of the specific aggravating circumstances which a prosecutor is intending to utilize in seeking a death sentence.

This Court is not aware of any authority which supports this contention of the Petitioner. It should be noted, however, in this connection that although there was no written notice of

aggravating circumstance served on defense counsel, the trial transcript shows that the prosecutor did orally inform trial counsel that prior convictions of the defendant would be used in aggravation. Petitioner was on notice that the State would seek the death penalty and was orally informed that prior convictions would be used in aggravation; therefore, even if notice was required, the Petitioner has failed to show how his due process rights were violated under the facts and circumstances of this case.

The next contention made by the Petitioner is one which we are accustomed to seeing in every death penalty case: the contention that the Petitioner's trial attorneys failed to render reasonably effective assistance of counsel. This contention was presented by the Petitioner at his state habeas corpus hearing and two of his trial attorneys appeared and testified at the hearing. We also have here the usual situation where Petitioner's present counsel, being different from his trial counsel, finds fault with the trial strategy and tactics used by Petitioner's trial counsel. These allegations by the present counsel which second guess the judgment of the trial attorneys are not sufficient to show ineffective assistance of counsel, and even if the representation of the Petitioner by his trial attorneys was not perfect, the allegations of the Petitioner do not establish that he received ineffective assistance of counsel. A review of the record by this Court leads this Court to the same conclusion which was reached by the Supreme Court of Georgia where that court

concluded that:

> "Bowden's trial counsel easily met the test of reasonably effective counsel."
> Bowden v. Zant, supra, at 781.

In the next section of his petition the Petitioner argues for the first time a claim that his statements given to police officers was involuntary because it was obtained without adequate constitutional warnings, etc. Petitioner has not raised these allegations in the state courts and this Court has previously held in connection with a motion to strike that the Petitioner has deliberately by-passed his opportunity to have done so. Therefore, no consideration will be given to this contention.

The Petitioner next complains about references to the statements of his co-defendant by the prosecutor in the form of questions to the Petitioner while he was on the stand, the Petitioner contending that these questions denied to the jury the content of his co-defendant's statements in violation of his rights to confrontation.

The transcript of Petitioner's trial shows that the Petitioner himself discussed his co-defendant's statements on direct examination and thereby raised the question of the contents of his co-defendant's statement. It is thus apparent that the Petitioner raised the question of whether the details contained in his statement had in fact come from the statement of his co-defendant prior to the time that the District Attorney questioned him about the

contents of that statement. The record shows that the statement of the co-defendant was not admitted into evidence and it was brought into discussion only because the Petitioner himself testified on direct examination concerning it. In this situation the Petitioner cannot sustain his contention that his rights under the confrontation clause were violated.

In the next section of the Petitioner's application for federal habeas corpus relief he alleges that his trial jury did not constitute a representative cross-section of the community because persons having conscientious scruples against capital punishment were systematically excluded.

In Brown v. Balkcom, 660 F2d 972, at 982 (5 Cir. 1981), the court stated:

> ". . . we hold that unalterable opposition to the death penalty is a legitimate disqualification and that the exclusion of such disqualified jurors does not violate the fair cross-section principle of the Sixth Amendment."

Next the Petitioner contends that the trial court's charge to the jury concerning the jury's consideration of the Petitioner's exculpatory statement was improper. No purpose would be served in quoting the court's charge. We deem it sufficient to observe that this Court agrees with the view of the Supreme Court of Georgia that the charge complained of did not deny the Petitioner his constitutional right to a fundamentally fair trial.

Next the Petitioner claims that the trial court's charge to the jury violated his constitutional rights because it failed to adequately define aggravating circumstances and failed to adequately explain mitigating circumstances, etc. This allegation was rejected by the state habeas corpus court and by the Supreme Court of Georgia. Bowden v. Zant, supra, at page 263. Here again, without quoting the court's charge, we conclude that a review of the court's charge shows that the instructions clearly comport with the requirements of Georgia law because a review of the charge as a whole shows that the jury was adequately charged as to their responsibility to determine mitigating and aggravating circumstances and their option to recommend a life sentence.

Finally, the Petitioner makes a general attack on Georgia's death penalty statute. The claims made by the Petitioner in this connection have been previously rejected by other courts and this contention is obviously without merit.

For all of the reasons above discussed, this Court determines that the Petitioner has had a full and fair opportunity to litigate all of his claims in the state courts and that the state court's findings of fact and conclusions of law are entitled to a presumption of correctness under 28 U.S.C. §2254, and that no further hearing is required.

Consistent with the foregoing, the relief sought by the Petitioner is denied and it is directed that the petition be dismissed and the Petitioner is remanded to the custody of the

Respondent so that the sentence heretofore imposed by the state court may be carried out according to law.

IT IS SO ORDERED this 6th day of May, 1983.

UNITED STATES DISTRICT JUDGE

OPPOSITION

BRIEF

ORIGINAL

83 7032

NO. 83-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JESSIE SMITH,

Petitioner,

v.

ROBERT FRANCIS, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT

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RECEIVED

QUESTIONS PRESENTED

I.

Whether the United States Court of Appeals for the Eleventh Circuit properly determined that Petitioner had failed to demonstrate the need for the appointment of a psychiatric expert concerning his competency and had failed to present a constitutional claim with respect to the denial of his request for the appointment of a psychiatrist to testify in mitigation at the sentencing phase, on an ex parte request that been presented to the trial court?

II.

Whether the United States Court of Appeals for the Eleventh Circuit properly determined in accordance with the standard set forth by this Court in Strickland v. Washington, ___ U.S. ___, 80 L.Ed. 2d 674, (May 14, 1984) that Petitioner received reasonably effective assistance of counsel?

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NO. 83-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JEROME BOWDEN,

Petitioner,

v.

ROBERT FRANCIS, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, Jerome Bowden, received a twenty year sentence for the offense of burglary, a ten year sentence for the offense of aggravated assault, a life sentence for the offense of armed robbery and the death penalty for the murder of Kathryn J. Strykes in the Superior Court of Muscogee County, Georgia on December 8, 1976. Petitioner pursued his direct appeal to the Supreme Court of Georgia and that court affirmed Petitioner's convictions and sentences in Bowden v. State, 229 Ga. 821, 230 S.E.2d 905 (1976).

Following the affirmation of Petitioner's convictions and sentences by the Supreme Court of Georgia, Petitioner filed a petition for a writ of certiorari to this Court which was denied in April of 1978. Then, Petitioner filed a petition for

a writ of habeas corpus in the Superior Court of Butts County, Georgia on June 30, 1978. Hearings were held in the Superior Court of Butts County, Georgia on July 6 and 31, and October 16, 1978. Following these evidentiary hearings, the Superior Court of Butts County, Georgia denied Petitioner the relief sought by means of his petition for a writ of habeas corpus in an order dated January 10, 1979.

Petitioner filed an application for a certificate of probable cause to appeal to the Supreme Court of Georgia which was granted. In Bowden v. Zant, 244 Ga., 260, 260 S.E.2d 415 (1979), the Supreme Court of Georgia affirmed the decision of the state habeas corpus court denying Petitioner state habeas corpus relief. Petitioner's motion for rehearing was denied by the Supreme Court of Georgia on September 5, 1979. Petitioner then filed a petition for a writ of certiorari in this Court which was denied on February 19, 1980. Petitioner's petition for rehearing filed in this Court was denied on April 14, 1980.

Petitioner filed an extraordinary motion for new trial in Muscogee County, Georgia, on April 29, 1980. The basis of Petitioner's extraordinary motion for new trial was an allegation that there was "newly discovered evidence." Following a hearing, the extraordinary motion for new trial was denied and Petitioner appealed to the Supreme Court of Georgia. In Bowden v. State, 250 Ga. 185, 297 S.E.2d 31 (1982), the Supreme Court of Georgia affirmed the decision of the Superior Court of Muscogee County, Georgia determining that the trial court did not abuse its discretion in denying Petitioner's extraordinary motion for new trial.

On December 10, 1982, Petitioner filed an application for federal habeas corpus relief, accompanied by a motion for a stay of execution, in the United States District Court for the Middle District of Georgia, Columbus Division. The application for a stay of execution was granted on December 10, 1982. Following the filing of an answer-response to the petition, the United States District Court directed the parties to file any

further matters within twenty days of the date of the order, i.e., March 18, 1983, so as to allow the court to proceed to a consideration of the matter.

On May 6, 1983, the United States District Court for the Middle District of Georgia, Columbus Division, denied Petitioner the relief sought by means of his application for federal habeas corpus relief and directed that the petition be dismissed. Petitioner filed an application for a certificate of probable cause to appeal which was granted by the district court on June 10, 1983. A notice of appeal was filed on behalf of the Petitioner on June 10, 1983.

Following oral argument, the United States Court of Appeals for the Eleventh Circuit affirmed the denial of federal habeas corpus relief in Bowden v. Francis, 733 F.2d 780 (11th Cir. 1984). Petitioner's motion for rehearing and rehearing en banc was denied on June 22, 1984. The filing of a petition for a writ of certiorari in this Court seeking to review the judgment of the United States Court of Appeals for the Eleventh Circuit followed. Further facts will be developed as necessary for a more thorough review of the issues raised by means of this petition.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT PROPERLY FOUND THAT PETITIONER HAD FAILED TO DEMONSTRATE THE NEED FOR THE APPOINTMENT OF A PSYCHIATRIC EXPERT TO EXAMINE PETITIONER AS TO COMPETENCY AND FURTHER, HAD FAILED TO REQUEST THE APPOINTMENT OF A PSYCHIATRIC EXPERT TO TESTIFY IN MITIGATION AT THE SENTENCING PHASE, THEREBY PRESENTING NO CONSTITUTIONAL CLAIMS.

Petitioner contends that the trial court should have granted his pretrial motion for the appointment of a psychiatrist to perform a psychiatric evaluation, claiming that he made a reasonable showing of the need for a psychiatric evaluation at pretrial hearing on the issue of Petitioner's competency. Petitioner argued that due to the lack of expert psychiatric evaluation, he was improperly precluded from litigating psychiatric issues concerning the question of his competence to stand trial and mental illness and was also deprived of the right to present psychiatric testimony in mitigation at the sentencing phase of Petitioner's trial.

The United States Court of Appeals for the Eleventh Circuit cited its own decision in Hance v. Zant, 696 F.2d 940 (11th Cir.), cert. denied, ___ U.S. ____, 103 S.Ct. 3544 (1983), which relied on this Court's decision in Pate v. Robinson, 383 U.S. 375, 385, 387 (1966), for the proposition that it is a due process violation to try a criminal defendant while he is mentally incompetent and incapable of understanding the nature of the proceedings or assisting in the defense of the case. Bowden v. Francis, 733 F.2d 760, 766 (11th Cir. 1984).

However, examining the evidence developed in prior proceedings, both pretrial and in the state habeas corpus proceedings, the United States Court of Appeals for the Eleventh Circuit stated that, " . . . a bonafide doubt as to Bowden's competence was not presented." Id. at 767. Therefore, the court properly determined that the trial judge had no obligation to have Petitioner examined by a psychiatrist to determine his competence. The United States Court of Appeals for the Eleventh Circuit summarized the evidence which it had reviewed by stating the following:

> In this case, the evidence of Bowden's past behavior and his behavior and demeanor before the trial judge plainly failed to create a bonafide doubt as to his competency to stand trial. Nor was there any evidence of a prior medical opinion that might have raised such a doubt. The trial judge therefore committed no pretrial error in denying Bowden's motion for a psychiatric evaluation.

Id.

However, the United States Court of Appeals for the Eleventh Circuit did not stop with its analysis here. But rather, found that under Pate v. Robinson, supra, it had an additional obligation to review the record to determine if there was any evidence that a bonafide doubt as to Petitioner's competency arose during the trial proceedings occurring after the hearing on the special plea of insanity. The court concluded that:

> In this case, though, nothing that transpired after the denial of Bowden's motion for an examination raised such a doubt. On the contrary, any lingering uncertainty that may have existed concerning the defendant's competence disappeared.

> First, Bowden's counsel withdrew his special plea of insanity, a tacit admission that without expert psychiatric testimony he could not satisfy a jury, on a trial on the special plea, that his client was incompetent . . . . Second, the events that transpired throughout the remainder of the trial suggested that Bowden was indeed competent. He took the stand in his own defense and testified coherently, responding to the questions put to him on both direct and cross-examination.

Id. at 1210-11.

At Petitioner's state habeas corpus hearing, one of Petitioner's attorneys, Mr. Samuel Oates, stated that he filed a motion for the appointment of an expert witness to psychiatrically examine the Petitioner and determine his competency to stand trial. (State habeas corpus tran. vol., pages 124-125). Mr. Oates stated that he had some difficulty communicating with the Petitioner about the facts of the crime, but not about other subjects and thought that perhaps it would be beneficial to have Petitioner examined prior to the trial. (State habeas corpus transcript, pages 124-125). As the hearing on the motion for a psychiatric examination indicates, Mr. Oates testified, as well as Petitioner's sister and his niece. The state habeas corpus court noted that the testimony of Petitioner's sister and niece involves such statements that the Petitioner had "passed out" children on the family and that on occasion he would lie on the bed for hours at a time. (Motion transcript, pages 9, 11). Petitioner's counsel testified at the hearing before the trial court that Petitioner was unable to relate a clear sequence of events surrounding the time of the alleged crime. (Motion transcript, pages 43-46).

Mr. Oates testified at the state habeas corpus hearing that a partial reason for filing both the motion for psychiatric

examination and a special plea of insanity was to delay the trial in the hope that there might be a break in the case for the defense. (State habeas corpus transcript, page 132). Mr. Oates testified that Petitioner knew about the offense with which he was charged, i.e., that he knew he was charged with murder and was subject to having the death penalty imposed. (State habeas corpus transcript, pages 126, 127). At the state habeas corpus hearing, Mr. Oates testified that in his opinion, the trial court did not err in denying a motion for a psychiatric examination based on the allegations that they were able to produce in support of those motions. (State habeas corpus transcript, page 128). Mr. Oates stated, "there was no evidence that Jerome had acted irrationally at any time." (State habeas corpus transcript, page 131). Petitioner's trial attorneys withdrew their special plea of insanity after the trial judge overruled the motion for the appointment of a psychiatrist because they felt they had nothing to offer in support of a special plea. (State habeas corpus transcript, page 126).

The only evidence of any type of penal disturbance which Petitioner's family members could cite at the time of the hearing on the motion for an appointment of a psychiatrist was general allegations relating to Petitioner's mental condition. For example, there was testimony that Petitioner had been a problem from the time he was born. (Motions transcript, page 9). Petitioner's sister stated, "I know something's wrong with his mind, but I ain't got no proof of that." (Motions transcript, page 15).

Respondent submits that the United States Court of Appeals for the Eleventh Circuit properly determined that this type of evidence did not raise a reasonable doubt as to Petitioner's competency, nor has Petitioner alleged that there were any circumstances occurring after the denial of the motion for appointment of a expert which would indicate Petitioner's incompetence.

Having examined the evidence before the court, the United States Court of Appeals for the Eleventh Circuit properly compared this case with other cases within the "Estelle jurisprudence". The court concluded, citing Reese v. Wainwright, 600 F.2d 1085, 1091 (5th Cir.), cert. denied, 444 U.S. 983 (1979), that Petitioner had failed to establish a real, substantial and legitimate doubt as to his mental competency during trial. Rowden, 735 F.2d at 366. Respondent contends that the correct standard was applied by the court.

Petitioner also contends that his constitutional rights were violated because he was denied the assistance of a psychiatrist to present mitigating testimony at the sentencing phase of his trial. However, as the United States Court of Appeals for the Eleventh Circuit properly noted, "Rowden's motion for the appointment of a psychiatrist was limited to the issues of his competence to stand trial and his sanity at the time of the offense. It said nothing about the appointment of a psychiatrist to testify in mitigation during the sentencing phase of the trial." Id. at 365. The court further stated:

> To hold that the state trial judge denied Rowden due process of law by not providing him with a psychiatrist to testify in mitigation, when Rowden made no request therefore, would require us to find that a trial judge has a duty under the Constitution to make such provisions sua sponte. This we refuse to do.

Id. at 367.

It should be noted that as in Westbrook v. Zant, 704 F.2d 1487 (11th Cir. 1983), in which the Petitioner raised a similar claim, the evidence for which Petitioner sought a psychiatrist could have been shown by other methods, such as introducing the testimony of friends, relatives or neighbors. In this case, the evidence offered in support of the motion for a psychiatric evaluation could have been presented to the jury either at the

guilt innocence phase of the trial, or at the sentencing phase of the trial if mitigation. But Petitioner's trial attorney made a reasonable tactical decision that this evidence would not be effective or beneficial to the Petitioner and therefore determined that this or similar evidence should not be repeated during the trial of the case itself. Additionally, Petitioner did take the stand during the penalty phase of the trial and, at that time, he could have presented additional mitigating testimony as to his intelligence, mental ability or mental history, some of which he did present and some of which was presented by his attorney on his behalf.

Respondent submits that Petitioner failed to preserve this claim, by not requesting it in the trial court and additionally, that the District Court properly determined that there was no abuse of discretion in the trial court on the basis of the evidence presented. Petitioner has failed to raise a constitutional claim for this Court's review based on these allegations.

Petitioner contends that because this Court has granted a petition for writ of certiorari in Ake v. Oklahoma, ___ U.S. ___, 54 U.S. L. 4239 (March 19, 1986), this Court should also grant certiorari to decide these issues. Respondent submits that there are factual distinctions between this case and that presented to the Court in Ake v. Oklahoma, supra. One of the questions presented in Ake v.Oklahoma, supra, is stated as following, "Where indigent defendant's sanity at time of offense is seriously in issue, can state constitutionally refuse to provide any opportunity whatsoever for him to obtain expert psychiatric examination necessary to prepare and establish his insanity defense and to present evidence in mitigation of punishment and in rebuttal of alleged aggravating offense of predicted future violence proven by state through psychiatric testimony?" On its facts, this case is distinguishable, as Petitioner's sanity at the time of the offense is not seriously in issue. Rather, it was the

competency of Petitioner to stand trial that was being litigated and not his prior mental state. Further, the state was not attempting to utilize the aggravating circumstance of 'prior violence', as therefore, Petitioner was not denied the right to rebut such evidence. These facts serve to distinguish this case from that presented to the court in Ake v. Oklahoma, supra, and therefore, these issues present nothing for this Court's review.

II. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT PROPERLY CONCLUDED THAT PETITIONER'S TRIAL COUNSEL EASILY MET THE TEST OF REASONABLY EFFECTIVE ASSISTANCE.

Petitioner contends that applying this Court's recent decision in Strickland v. Washington, ___ U.S. ___, 25 Cr. L. 3168 (May 26, 1984), to the facts of this case, that he was denied the effective assistance of counsel at his capital sentencing trial. Petitioner argues that his trial counsel's strategy was to show that Petitioner was "mentally deficient" but that Petitioner's counsel failed to conduct even a "cursory investigation" to discover readily rebuttable evidence in support of this strategy. Essentially, Petitioner contends that his trial attorney should have presented evidence that Petitioner was "weak-minded" to the jury and that he also should have presented evidence that Petitioner was manipulated by his co-defendant, James Dobbs.

In Strickland v. Washington, supra, this Court noted that while the Sixth Amendment guarantees a criminal defendant the right to assistance of counsel, a vital corollary to this guarantee is the requirement of effective assistance of counsel. Id. at 3071. However, this Court noted in Washington v. Strickland that a petitioner in a habeas corpus action who seeks to collaterally overturn his conviction on grounds of ineffective assistance of counsel must prove his entitlement to

relief sought by a preponderance of the evidence. Id. This Court also noted that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id.

In order to prevail on a claim of alleged ineffective assistance of counsel, this Court stated that a petitioner must first demonstrate that counsel's performance was deficient, which requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed to a defendant by the Sixth Amendment. Next, a defendant must show that the deficient performance prejudiced the defense. As this Court noted, "[t]his requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id.

The Court also noted the following:

> Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, that is, the defendant must overcome the presumption that, under the circumstances, the challenged action, "might be considered sound trial strategy."

Id. at 3065.

In deciding an actual ineffectiveness claim, this Court stated that the reasonableness of counsel's challenged conduct on the facts of the particular case must be viewed as of the time of counsel's conduct. During this inquiry, the Court stated that it should be recognized that, " . . . counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id.

Respondent submits that the United States Court of Appeals for the Eleventh Circuit properly determined that Petitioner had presented no evidence to show that counsel's pretrial investigation was inadequate. As Petitioner's trial counsel had conferred with Petitioner on eight or ten occasions and pursued all leads provided to him by Petitioner, interviewing all available witnesses. Bowden, 735 F.2d at 756. Further, Petitioner's counsel attempted in every way to prevent Petitioner's "highly damaging statements" to the police from being admitted into evidence, as well as attempting to discredit the statements. Id. at 756. The United States Court of Appeals for the Eleventh Circuit properly rejected Petitioner's claim that his attorney failed to interview critical witnesses, finding that, "Bowden makes no proffer of what counsel would have discovered had he interviewed these witnesses, and nothing in the record indicates what he would have discovered. In fact, Bowden does not even support his counsel's failure to conduct these interviews prejudiced his case." Id. at 756.

Due to the fact that Petitioner had already given two confessions to the police and could provide his attorney with no substantive witnesses to establish an alibi defense, counsel for Petitioner had very little to work with in preparing a defense for Petitioner, but a reasonable investigation into the possible lines of defense was conducted by Petitioner's trial counsel. Petitioner's counsel investigated Petitioner's mental condition, by talking with Petitioner's sister, his niece and his nephew and the persons in the Petitioner's neighborhood with whom he normally associated. (State habeas corpus transcript, page 118).

As already noted, Mr. Oates [illegible] to the entire State's file, saw all the statements contained in the file and reviewed the detailed autopsy report. (State habeas corpus transcript pages, 122-123).

Having unsuccessfully sought to establish a defense for the Petitioner in the form of an alibi defense and subsequently having failed to find sufficient evidence to support the granting of a motion for an independent psychiatric examination, or to pursue the special plea of insanity, Petitioner's trial attorney determined that the best defense was to attack the prosecution's case. Mr. Oates testified that one of his defense tactics was to try to establish that Petitioner's confessions were coerced and were the products of promises by law enforcement authorities. Mr. Oates stated that the first line of defense for the Petitioner was to keep Petitioner's confessions from being admitted at trial. (State habeas corpus transcript, pages 123-126). As already noted, Petitioner's counsel was successful to the extent that one of the statements was excluded because Petitioner's trial attorney established that Petitioner had been denied his right to counsel at the time the statement was given.

Respondent submits that there has been no showing that counsel's representation at the guilt innocence phase was constitutionally deficient, nor that Petitioner suffered any prejudice due to the conduct of counsel.

With respect to the [illegible]presentation rendered by Petitioner's trial attorney at the sentencing phase of the trial, Petitioner submits that Petitioner's "mental deficiency" was the cornerstone of all the defense strategies at both phases of the trial, but that Petitioner's counsel did not act on the basis of sound strategy because he failed to present "psychiatric" evidence as to Petitioner's mental state, (see I.D. and also consideration to the jury at the sentencing phase. The United States Court of Appeals for the Eleventh Circuit noted, however, that there was evidence presented on behalf of the Petitioner by his attorney, and that Petitioner's actual contention was that there was not enough of this type of evidence presented to the jury. Bowden, 735 F.2d at 756.

As the United States Court of Appeals for the Eleventh Circuit noted:

> Attorney Haines did present evidence, through Bowden's testimony, that Bowden had done poorly in school, finishing only the eighth or ninth grade, that much of his education had taken place in special education classes for slow learners, and that he was not able to read very well. Counsel also presented evidence that Bowden had left school because of a disagreement with his principal and that his mother had struggled to have a psychiatrist examine his mental problems earlier, apparently often to get Bowden out of trouble with the law.

Id.

The United States Court of Appeals for the Eleventh Circuit also noted that trial counsel's argument to the jury discussed Petitioner's history of mental deficiency and the problems he had during his school years. Id.

The United States Court of Appeals for the Eleventh Circuit applied the standards set forth by this Court in Strickland v. Washington, supra, when it concluded that, "In sum, there is no reason to believe that the jury on the basis of this additional evidence of Bowden's low intelligence would have recommended a different sentence." Id.

Respondent submits that the holding of the United States Court of Appeals for the Eleventh Circuit is just another way of stating that there is no reasonable probability that the omissions of counsel are such as to undermine confidence in the outcome. See Strickland v. Washington, supra, at 2073. When a defendant challenges his death sentence, the question is whether there is a reasonable possibility that, absent the errors of counsel, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not

warrant death. In making such a determination, this Court further stated that this is a question which must be based on the totality of the evidence before the jury. Id.

The United States Court of Appeals for the Eleventh Circuit concluded, in light of the fact that counsel did present mitigating evidence on Petitioner's behalf at the sentencing phase and that the evidence not presented would have been "merely cumulative," that the failure to admit this evidence did not undermine a reviewing court's confidence in the outcome of the sentencing phase. As the United States Court of Appeals for the Eleventh Circuit properly applied this Court's standard in Strickland v. Washington, and this issue presents nothing for review by this Court.

CONCLUSION

As no substantial federal constitutional question is presented for this Court's review, Respondent prays that this Petition for a Writ of Certiorari be Denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Susan V. Dileys, Attorney of Record for the Respondent and a member of the Bar of the Supreme Court of the United States, certify that in accordance with the rules of the Supreme Court of the United States I have this day served a true and correct copy of this brief for the Respondent in Opposition upon the Petitioner's attorney by depositing a copy of this brief in the United States mail, with proper address and adequate postage to:

August F. Siemon
Counsel for Petitioner
P. O. Box 599
Atlanta, Georgia 30301

This 17th day of July, 1986.

SUSAN V. DILEYS
Assistant Attorney General

OPINION

SUPREME COURT OF THE UNITED STATES

JEROME BOWDEN *v.* ROBERT FRANCIS, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 83-7032. Decided March 25, 1985

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Ake* v. *Oklahoma*, 470 U. S. —— (1985).

JUSTICE O'CONNOR, with whom JUSTICE WHITE and JUSTICE REHNQUIST join, dissenting.

By its action today, the Court vacates the judgment of the Court of Appeals and remands this case for reconsideration in light of *Ake* v. *Oklahoma*, 470 U. S. —— (1985). Because I believe that *Ake* is not applicable to the present case, I respectfully dissent.

Petitioner was convicted of murder and sentenced to death. Before trial, defense counsel filed a special plea of insanity and requested the appointment of a psychiatrist to examine petitioner. The trial court, after a hearing, found that the evidence suggesting petitioner's incompetency was insufficient to warrant a psychiatric examination. The court then advised defense counsel that it would proceed to summon a jury to try petitioner on the issue of competence to stand trial if Bowden wished to litigate his special plea of insanity. Counsel rejected the offer and withdrew the special plea. Petitioner subsequently took the stand at trial and testified coherently in his own behalf. After his conviction and sentence were affirmed on direct appeal, petitioner sought federal habeas relief arguing that the trial court should have granted the requested psychiatric examination to determine his competency and that he also should have

received the assistance of a psychiatrist to gather mitigating evidence.

The Court of Appeals affirmed the district court's denial of habeas relief. With respect to the trial court's refusal to order a pre-trial examination, the Court of Appeals agreed with the federal district court and the state courts that petitioner had failed to present evidence raising a bona fide doubt as to his competency. As to psychiatric assistance to gather mitigating evidence, the Court of Appeals found no constitutional error because petitioner had not requested the state trial court to appoint a psychiatrist for that purpose. The petition before this Court renews the contentions that the trial court erred in not ordering a pre-trial psychiatric examination and that petitioner was entitled to the assistance of a psychiatrist to present mitigating evidence. The Court of Appeals will be understandably confused by the Court's action in vacating the judgment and remanding for reconsideration in light of *Ake*. Because *Ake* does not suggest that the Court of Appeals erred in its disposition of this case, I would deny the petition for certiorari.

JUSTICE POWELL took no part in the consideration or decision of this case.